IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.10193 OF 2004
WITH
WRIT PETITION NO.10203 OF 2004

Smt.Sindhu Vithal Bhingarde & Anr...Petitioners

Versus

Santosh Chandrakant Dhuru & Ors...Respondents

Mr. P.K.Shetty, for the Petitioners
Mr. R.C. Dhuru, for the Respondents

CORAM: F.I. REBELLO J.
DATE : 12th January, 2005

P.C.:

. Both the petitions are being disposed of by this common order as the issues raised are more or less same.

2. The petitioner in Writ Petition NO.10193 of 2004 are the legal representatives of original plaintiff Vithal Jairam Bhingarde, since deceased. Amongst others they sought a relief that the original plaintiff is a monthly tenant of the defendant and consequential reliefs.

3. After evidence had been recorded and the matter was at the stage of arguments the petitioners moved an application for amendment being interim Notice No.444 of 2004 seeking additional prayers that the original plaintiff was the lawful sub-tenant and/or protected licensee of the shop. That came to be dismissed by order dated 3rd November, 2004.

4. Writ Petition No.10203 is filed by the legal heirs of original Defendant No.2. The original plaintiff therein Chandrakant Bhai Dhuru who are Respondent Nos. 1 to 5 herein filed a suit for eviction against the original defendant NO.1 on the ground that the original defendant was in unauthorised occupation of the suit premises. The original defendant filed written statement wherein he raised a plea that he was the direct tenant of the original plaintiff.

. After evidence had been recorded as the matter was posted for final arguments an application for amendment came to be moved being Notice No.4440 of 2004 in R.A.E. Suit No.3097 of 1976 to amend the written statement. By the said amendment the defendants sought to raise a plea that they are lawful sub-tenants and/or protected licensees of the suit premises. That came to be rejected by order dated 3rd November, 2004 and consequently the present petition.

5. At the hearing of these petitions on behalf of the petitioners their learned Counsel submits that it is open to the petitioners herein to have raised inconsistent pleas. Once that be the case the action of the learned trial Court in rejecting the application for amendment of the plaint or written statement clearly discloses an error of law apparent on the face of the record. Learned Counsel placed reliance on the judgment of the Apex Court in the case of Basvan Jaggu Dhobi vs. Sukhnandan Ramdas Chaudhary (dead) through L.Rs. & Ors., (1996 Bom. C.R.316). Placing reliance on the said

judgment it is sought to point out that it is open to a defendant to take even contrary stand or contradictory stands and thereby the cause of action is not in any way affected. That, however, would not apply to the case where plaint is being amended so as to introduce a new cause of action. It is, therefore, submitted that the learned trial Court ought to have granted the relief as prayed for.

6. In Writ Petition No.1093 of 2004 the plaintiffs application being interim Notice No.4441 of 2004 was rejected on the ground that the pleas were inconsistent. It is this order which is the subject matter of the present petition. To my mind it cannot be said that the orders suffer from any error apparent on the face of the record. The petitioners herein had come to the Court with the clear plea that they were direct tenants of the landlord. The plea is to amend the plaint or to take an entire different stand namely that they are sub-tenants or licensees. In other words the cause of action on which the relief is sought would be entirely different from the cause of action on which the earlier relief was sought. Apart from that the amendment application is taken out at a belated stage and that too after the evidence had been closed in a suit of 1976. In my opinion, therefore, the impugned order is not liable to be set aside.

7. In so far as Writ Petition No.10903 of 2004 is concerned, the application for amendment was dismissed placing reliance on the observations in the judgment of this Court

reported in 2001 (2) All M.R. 556. In that case the view taken by this Court was that the alternative plea inconsistent with disruptive of the original plea cannot be allowed. The argument of the petitioners herein perhaps could have been considered. However, the fact remains that the plea was sought to be raised only after the evidence had been concluded. Even otherwise in the suit for eviction it is for the plaintiff to establish that the defendants petitioners herein are in unaurhorised occupation. Apart from that the petitioners have already filed a suit for declaration of tenancy. If they succeed in that suit the suit filed by the respondent landlord will otherwise have to be dismissed if there are no other reliefs claimed which are not based on the said plea of unauthorised occupation. Considering that, to my mind this will not be a fit case where this Court should exercise extra ordinary jurisdiction. The suit is of the year 1976. The defence now sought to be raised could have been open to the petitioners herein to raise the same at the time when they first filed their written statement. It appears that the entire amendment is only to prolong and protract the proceedings.

8. Considering the above both Writ Petitions rejected.

(F.I.REBELLO, J.)